CROCUSES & DAFFODILS (M) SDN. BHD.

v.

DEVELOPMENT & COMMERCIAL BANK BHD.

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-02-847-1995]
31 MARCH 1997

COMPANY LAW: *Winding-up - Opposition to petition - Notice of intention to oppose petition - Affidavits opposing petition - Whether properly served on petitioner - Companies (Winding-Up) Rules 1972, r. 30(1) - Whether affidavits admissible - Whether cross-claim disclosed*

The material facts of the instant appeal were that the respondent petitioner ('the bank') had issued a winding-up petition ('the petition') against the appellant company ('the company'). The petition was appointed to be heard on 24 September 1992. On 21 September 1992, the company filed a notice of intention ('the notice') to oppose the petition. The notice was supported by four affidavits in opposition ('the affidavits'). At the actual hearing of the petition on 24 November 1995, the bank took an objection to the admission of the affidavits on the ground that they contravened r. 30(1) of the Companies (Winding-Up) Rules 1972 ('the Rules'). The trial Judge allowed the bank's preliminary objection and ordered the company to be wound up. The company appealed to the instant Court against the said winding-up order, contending, *inter alia*, that: (i) the trial Judge's refusal to grant an adjournment of the hearing of the petition on 24 November 1995 had prejudiced the company; and (ii) as the trial Judge had never heard the petition on its merits, the said winding-up order could not be upheld.

Held:
Per Siti Norma Yaakob JCA

[1] Although s. 221 of the Companies Act 1965 empowers the Court with the discretion to grant an adjournment, the trial Judge was right in refusing to grant an adjournment in the present case.

[2] The service of all the affidavits on the bank had clearly and blatantly contravened the mandatory time requirement prescribed by r. 30(1) of the Rules and, therefore, the trial Judge was right in refusing to admit them. Consequently, as the affidavits were inadmissible, there was no evidence

of the company's cross-claim which warranted the notice to be heard on its merits.

[3] Furthermore, the petition was presented five years ago and the company's indebtedness had been established as long ago as in 1984. Proceedings in the form of execution of judgments should never be allowed to drag on, more so where such proceedings concern the compulsory winding-up of a company.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG SYARIKAT: *Penggulungan - Tentangan kepada petisyen - Notis niat untuk menentang petisyen - Afidavit menentang petisyen - Samada disampaikan kepada pempetisyen dengan sempurna - Kaedah (Penggulunggan) Syarikat 1972, k. 30(1) - Samada afidavit boleh diterima masuk - Samada tuntutan balas telah didedahkan*

Fakta penting dalam rayuan ini adalah bahawa pempetisyen responden ('bank') telah mengeluarkan petisyen penggulungan ('petisyen') terhadap syarikat perayu ('syarikat'). Petisyen ditetapkan untuk pembicaraan pada 24 September 1992. Pada 21 September 1992, syarikat memfailkan notis niat untuk menentang petisyen tersebut ('notis'). Notis itu disokong oleh empat afidavit menentang ('afidavit'). Semasa perbicaraan sebenarnya petisyen tersebut pada 24 November 1972, bank membuat bantahan terhadap penerimaan masuk afidavit tersebut atas dasar ia bertentangan dengan k. 30(1) Kaedah (Penggulungan) Syarikat 1972. Hakim perbicaraan membenarkan bantahan awal bank dan membuat perintah supaya syarikat itu digulung. Syarikat telah merayu kepada Mahkamah ini membantah perintah penggulungan dengan hujah, *inter alia,* bahawa: (i) keengganan Hakim perbicaraan untuk memberi penangguhan perbicaraan petisyen pada 24 November 1995 telah memprasangkakan syarikat; dan (ii) oleh kerana Hakim perbicaraan tidak membicarakan petisyen atas merit, perintah penggulunggan tersebut tidak boleh disahkan.

Diputuskan:
Oleh Siti Norma Yaakob HMR

[1] Walaupun s. 221 Akta Syarikat 1965 memberi kuasa kepada Mahkamah untuk menggunakan budibicara dalam memberi penangguhan, namun Hakim perbicaraan adalah betul dalam menolak penangguhan dalam kes ini.

[2] Penyampaian semua afidavit kepada bank telah secara terang dan kasar melanggar kehendak masa yang dinyatakan dalam k. 30(1) kaedah dan dengan itu Hakim perbicaraan adalah betul dalam menolak penerimaan masuknya. Oleh yang demikian, oleh kerana afidavit tersebut adalah tidak boleh diterima masuk, maka tiada keterangan mengenai tuntutan balas syarikat yang boleh menjadi asas perbicaraan notis tersebut atas merit.

[3] Lagipun, petisyen itu disampaikan lima tahun lalu dan hutang syarikat tersebut telah dibuktikan sejak 1984 lagi. Prosiding dalam bentuk pelaksanaan penghakiman tidak sepatutnya dibenarkan terus begini, lebih-lebih lagi bila prosiding adalah mengenai penggulungan wajib sebuah syarikat.

[Rayuan ditolak.]

Legislation referred to:
Companies Act 1965, ss. 218, 221(1), 236(2)
Companies (Winding Up) Rules 1972, rr. 28, 30(1)
National Land Code 1965, s. 254
Rules of the High Court 1980, O. 14

[Appeal from High Court Malaya, Kuala Lumpur; Winding-up Petition No: D1-23-56-92]

For the appellant - Dennis Xavier; M/s. Jayaraman, Ong & Co.
For the respondent - D.P. Naban (S.P. Muthuveloo with him); M/s. Lee & Hishammuddin

JUDGMENT

Siti Norma Yaakob JCA:

We heard this appeal, dismissed it with costs and we now give our reasons for our decision.

On 30 November 1995, the High Court ordered the winding up of the appellant ('the company') after allowing a preliminary objection raised by the respondent/petitioner ('the bank') that there was no cross claim disclosed by the company that warranted their notice of intention to oppose the petition to be heard on its merits. It is to appeal against this order that the parties were before us.

By way of a factual background we need to go back to 1982 when on 11 February of that year, the bank approved an additional overdraft facility for RM5.5 million to one T. Raju s/o M. Kerpaya @ Jayaraman s/o M. Kerpaya ('the borrower') for a period of one year and repayable on demand.

a The overdraft facility was secured by a first legal charge created on land, Pegangan No. 1361, Pechahan Bandar 1, Daerah Timur Laut, Pulau Pinang (the charged land) of which the company were the registered proprietors at the material time.

b On 24 February 1984, the bank issued a letter of demand to the company stating the amount of the borrower's indebtedness to be RM8,741,469.37 as at 19 February 1984 and demanding that the company pay the amount within fourteen days of the date of the letter of demand, failing which the bank would proceed to foreclose the charged land and sell it under the provisions of the National Land Code 1965 ('the NLC').

c Needless to say the company failed to comply with the letter of demand and on 15 March 1984, the bank served the company with a Form 16D notice, pursuant to s. 254 of the NLC. The company also failed to remedy the specified breach within the time stipulated in the statutory notice and the bank d filed originating summons No. F 525 of 1984 in the High Court at Kuala Lumpur praying principally for an order of sale of the charged land. A consent order to that effect was obtained by the bank on 3 April 1985 for the recovery of RM10,450,952.26. The charged land was subsequently auctioned for RM1,162,800 on 19 September 1988.

e Since the proceeds of sale were insufficient to settle the borrower's indebtedness in full, the bank filed in Kuala Lumpur High Court, Civil Suit D4-22-1509-90 ('the 1990 suit') against the company and another claiming the balance of RM10,324,147.03, interest at 16% per annum on monthly interests from 1 August 1990 to date of realisation and costs after credit was given f for the proceeds of sale. Summary judgment under O. 14 of the Rules of the High Court 1980 was obtained by consent on 4 July 1991 and thereafter the bank took steps to enforce the judgment sum.

This came in the form of a statutory notice dated 30 November 1991 under s. 218 of the Companies Act 1965 ('the Act'), and served on the company g on 2 December 1991.

The company failed to comply with the notice calling upon them to make payment of RM12,763,391.24, the judgment sum inclusive of interest and costs remaining outstanding as at 30 November 1991 within the three weeks limited h by the notice, and the bank then issued a winding up petition, D2-28-56-92 dated 31 January 1992 and 24 September 1992 was endorsed as the hearing date of the petition. On 21 September 1992, three days before the hearing, the company filed a notice of intention to oppose the petition on the ground that they dispute the debt due to the bank.

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After a number of postponements, the petition was finally fixed for hearing on 24 November 1995, four years after the petition was presented. This delay was due to the fact that:

(1) The company filed appeals against the consent judgment obtained in the 1990 suit. The first appeal to the Judge in chambers was dismissed and likewise their subsequent appeal to the then Supreme Court on 8 December 1994. An application for stay of execution was also applied for by the company but this too, was refused by the High Court on 20 June 1995.

(2) The company, as co-plaintiff together with the borrower and another, sued the bank as defendant, in Kuala Lumpur High Court Civil Suit S4-22-551-91 ('the 1991 suit') for negligence and fraud. They claim that the bank was negligent when the charged land was sold below market price and the alleged fraud makes reference to the bank's representation that sums were due under the charge and acting on that representation they had agreed to the sale of the charged land. Based on these allegations, the company contend that the consent order for sale of the charged property should be set aside or alternatively damages be awarded. This 1991 suit is still pending.

Going back to 24 November 1995 when the petition was before the High Court together with the notice to oppose dated 21 September 1992 which was supported by four affidavits in opposition, the bank raised the preliminary objection that the Court should not admit the four affidavits on the ground that they had failed to comply with r. 30(1) of the Companies (Winding Up) Rules 1972 ('the 1972 Rules'). The learned Judge agreed with the bank and since evidence of the cross claim on which the company relied to oppose the petition was contained in the four affidavits and with their non-admission, the company were left with no ground to oppose the petition, the learned Judge ordered that the company be wound up, the official receiver be appointed as provisional liquidator and the bank's costs be paid out by the provisional liquidator from the company's assets.

The Memorandum of Appeal contains nineteen paragraphs setting out various grounds but before us, Mr. Dennis Xavier, Counsel for the company, confined his arguments to two issues namely:

(1) that the trial Judge's refusal to grant an adjournment of the hearing of the petition on 24 November 1995 had prejudiced the company;

(2) that since the trial Judge had never heard the petition on its merits, the winding up order made by him cannot be upheld.

From the notes of proceedings, it is clear that the company had requested for an adjournment of the hearing of the petition under s. 221(1) of the Act on the ground that they have a cross claim against the bank which has already been pleaded in the 1991 suit which is still pending. The appellant contend that the 1991 suit should be heard and determined before the petition is heard on its merits as the success of the 1991 suit in their favour would extinguish the debt due to the bank, the very debt upon which the petition is founded.

Section 221 of the Act empowers the Court with the discretion to grant an adjournment but in this instance the learned Judge refused to exercise his discretion and we consider that he had rightly done so for the following reasons.

Evidence of the company's cross claim is traversed in four affidavits supporting their notice of intention to oppose the petition. Objection to the admissibility of these four affidavits was taken by the bank for non-compliance with r. 30(1) of the 1972 Rules which reads as follows:

> **30. Affidavits opposing the petition and affidavits in reply.**
>
> (1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

The first date of hearing of the petition is endorsed in the petition to be 24 September 1992. The notice of intention to oppose the petition is dated 21 September 1992 and in the absence of any evidence to the contrary, we take 21 September 1992 as the date the notice was served on the bank. No objection can be raised to the fact that the bank became aware of such objection three days before the hearing as r. 28 of the 1972 Rules prescribes that the notice *"shall be served or if sent by post shall be posted in such time as in ordinary course of post to reach the address not later than 12 o'clock noon of the day previous to the day appointed for the hearing of the petition."*

On 24 September 1992, the petition was adjourned to 27 January 1994 to await the outcome of the appeal pending in the 1990 suit but two days before that, on 25 January 1994, the company served the bank with the first of the four affidavits in opposition affirmed on 25 January 1994 by one Leong Chi Kong. Clearly, service of this affidavit contravenes r. 30(1).

The petition was not heard on 27 January 1994 but adjourned to 15 February 1994 for the same reason that it was adjourned previously i.e. to await the outcome of the appeal pending in the 1990 suit. Two days before the adjourned

hearing and on 13 February 1995, the company served the bank with the second affidavit in opposition affirmed on 10 February 1995 by one Abdul Latiff bin Mohd. Ismail, the very same affidavit that was used by the company in their application for a stay of execution in the 1990 suit. Here again, there has been a blatant disregard of r. 30(1).

The petition was not heard on 15 February 1995 but instead adjourned to 17 August 1995, when a third affidavit in opposition affirmed by the same Abdul Latiff bin Mohd. Ismail affirmed on 15 August 1995 was served on the bank on 16 August 1995, a day before the hearing. This is yet another instance where r. 30(1) had not been complied with.

The petition was also not heard on 17 August 1995 but instead adjourned to 24 November 1995, but a day before the hearing i.e. on 23 November 1995, the company served on the bank their fourth affidavit in opposition affirmed by the same Abdul Latiff bin Mohd. Ismail on 21 November 1995. Again there has been non-compliance of r. 30(1).

By their words and expression, r. 30(1) is mandatory in nature and as such the learned Judge was correct when he refused to admit all four affidavits in opposition for non-compliance of that particular rule. The fact that the four affidavits were only relied upon on 24 November 1995 does not alter the position as such affidavits were intended for use in the earlier hearings which never took place as all the earlier hearings were adjourned for some reason or other.

Since the four affidavits containing averments of the cross claim are inadmissible in evidence, the only other evidence of the cross claim available to the company is that pleaded in their 1991 suit, which is yet to be heard and determined. It must not be forgotten that the petition is founded on a judgment that had been obtained by consent and since that consent judgment is now being questioned in the 1991 suit, an issue arises as to the *bona fides* of the cross claim itself. Under these circumstances we consider that it is unjust and inequitable to stay the winding up proceedings and deny the bank the right to have the company wound up for their inability to pay their debt. This is so as the cross claim can still be proceeded by the liquidator on behalf of the company under s. 236(2) of the Act.

The other factor that swayed us was the fact that the petition was presented five years ago and that the company's indebtedness had been established as long ago as 1984. Proceedings in the form of execution of judgments should never be allowed to drag on and more so where such proceedings concern the compulsory winding up of a company.

For the reasons that we have given, we do not consider that the learned trial Judge had erred in law when he refused to exercise his discretion under s. 221 of the Act and since there was no valid cross claim to consider, he had every right to have the company wound up and to make the other consequential orders.

Reported by Gan Peng Chiang